THE COURT OF APPEAL

CIVIL

[2017 No. 256]

The President

Irvine J.

McGovern J.

IN THE MATTER OF THE FREEDOM OF INFORMATION ACT 2014

BETWEEN

THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES

APPELLANT

AND

THE INFORMATION COMMISSIONER

RESPONDENT

AND

GAVIN SHERIDAN AND e-NASC EIREANN TEORANTA (TRADING AS "enet")

NOTICE PARTIES

JUDGMENT of the President delivered on the 6th day of March 2019

Background

1. This is an appeal by the Minister for Communications, Energy and Natural Resources ('the Minister') from a decision of the High Court (Noonan J.) dated 25th April 2017 which itself dismissed an appeal by the Minister from a decision of the Information Commissioner.

2. The background to the decision of the Commissioner, the appeal to the High Court and now this appeal is to be found in a request by the notice party, Mr. Gavin Sheridan, made under the Freedom of Information Act 2014, seeking records pertaining to the appointment of eNASC Eireann Teoranta (trading as 'enet') (hereinafter enet) as the Management Service Entity ('MSE') of the Metropolitan Area Networks ('MANs') which were developed under the Regional Broadband Programme. Four categories of records were sought initially, but only one of those remains in issue at this stage, that being "any contracts from 2009 between the department and enet in relation to the provision of broadband services via [MANs]". These are referred to as 'Concession Agreements' in the documentation.

3. Following a consultation process in which enet's views on the matter were canvassed, the Minister declined the request on confidentiality and commercial sensitivity grounds. The bases for refusing on such grounds are found in s. 35(1)(b) and s. 36(1) of the 2014 Act. There was an apparent concern on the appellant's part that the release of the Concession Agreement would damage enet's ability to operate in a competitive manner and would, in effect, penalise it for doing business with the State. The particular disadvantage perceived was that costs and prices would be made public and this could result in enet being undermined by competitors. On receipt of the decision, Mr. Sheridan proceeded to lodge an appeal with the Information Commissioner ('the Commissioner').

4. The Commissioner gave its decision on 30th November 2015, ruling in favour of Mr. Sheridan and requiring the Minister to release the Concession Agreement to him. It found that by virtue of s. 22(12) (b) of the 2014 Act, that there was a presumption that the refusal was not justified and the Minister had failed to discharge his burden in respect of same. It was the Commissioner's view that the Minister had not shown that there was a "reasonable expectation" of material loss accruing to enet, and accordingly, the first limb of s. 36(1) did not apply. However, the Commissioner considered that the second limb did apply in

circumstances where enet's competitive position was prejudiced and proceeded to assess whether, on balance, the public interest in disclosure prevailed. He concluded that disclosure was in the public interest and that non-disclosure of such information could only be justified in exceptional circumstances. With regard to the proposal not to disclose by reference to s. 35, the Commissioner determined that this was not applicable.

5. The Minister appealed the decision of the Commissioner to the High Court on a point of law pursuant to s. 24 of the 2014 Act. It was argued that the Commissioner had erred in his interpretation of the 2014 Act in the following respects;

(i) By substituting his own test and criteria for that enacted by the Oireachtas in s. 36(2);

(ii) by placing on onus of proof on the Minister pursuant to s. 22(12) (b) where the said section did not apply because the records in question were subject to an exemption and

(iii) by misinterpreting and misapplying the public interests test found ss. 35 and 23in a manner in which the Oireachtas could not have intended.

6. The matter came on for hearing before Noonan J. who delivered judgment on 6th April 2017 and dismissed the appeal.

Grounds of Appeal

7. No fewer than twenty-six grounds are referred to in the Notice of Appeal, but they may be summarised as follows:

(i) That the High Court erred in applying judicial review principles rather than those relating to statutory interpretation when dealing with an appeal on a point of law (Ground 1);

(ii) that the High Court erred in finding that the presumption under s. 22(12)(b) applied to exempted records (Grounds 2 to 7, 15, 18);

(iii) that the High Court erred in finding that the Minister was not entitled to raise the point as to the presumption as it had not be raised before the Commissioner (Grounds 8);

(iv) that the High Court erred in its interpretation and application of s. 35 of the 2014 Act (Grounds 9-10, 12, 22);

(v) that the High Court erred in respect of the standards to be applied where there is a claim that material should not be disclosed on grounds commercial sensitivity pursuant to s. 36 (Grounds 13-14,16-19);

(vi) that the High Court erred in its approach to how the balancing exercise with regard to the public interest should operate (Grounds 11, 20-23) and

(vii) that the High Court erred in affording excessive deference to the Commissioner (Grounds 21, 24).

8. The appellant has identified four aspects of the judgment of the High Court which he says were central, these being:

(i) [t]he nature of an appeal on a point of law;

(ii) the onus of proof pursuant to s. 22(12) (b);

(iii) the elements of the public interest test and

(iv) the meaning of s. 35(2).

Nature of an Appeal on a Point of Law

9. The appellant says that the High Court Judge became distracted from the task at hand, being the question of statutory interpretation and instead proceeded as if he was dealing with a judicial review. It is said that a reading of the judgment discloses an inappropriate

emphasis on judicial review concepts such as *vires*, and *ultra vires*, irrationality, discretion and so on. It said that the Judge was, in effect, tempted into error by submissions on behalf of the Commissioner which invited him to adopt an *O'Keeffe*-style irrationality test which it is said should have no bearing on the interpretation of a statute or an appeal on a point of law.

10. The appellant says that the approach adopted by the Trial Judge was clearly in conflict with that identified as appropriate by the Supreme Court in *Sheedy v. The Information Commissioner* [2005] 2 IR 272. There, Kearns J. had quoted McKechnie J. in *Deely v. The Information Commissioner* [2001] 3 IR 439, as saying:

> "(a) It (*i.e.*) the Court cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can, however, reverse such inferences if the same were based on the interpretation of documents and should do so if incorrect, and finally,
>
> (d) if the conclusions reached by such bodies show that they may have taken erroneous view of the law, then that is also a ground for setting aside the resulting decision . . ." and then he added
>
> "This is a helpful resume with which one would not disagree, but it would be obviously incorrect to apply exclusively judicial review principles to matters of statutory interpretation in the way that might be appropriate to issues of fact. A legal interpretation of a statute is either correct or incorrect and the essence of this case is to determine whether the interpretation given, first by the respondent and later by the High Court to s. 53 of the Education Act 1998, was correct or otherwise."

It is said that, really, the same point was made very clearly by O'Donnell J. in *Revenue Commissioners v. O'Flynn Construction Company* [2011] IESC 47. It is said that a careful reading of the judgment under consideration leaves no room for doubt, but that the Judge in the High Court was approaching matters on a fundamentally incorrect basis. It said that in a section of the judgment, which begins at para. 32 and is headed 'Discussion', the Judge discussed the standard of review in the case of an appeal on a point of law and it is said consistently fell into error. It is pointed out that the Judge quoted from *Deely v. The Information Commissioner*, but without referring to the highly significant remarks in relation to it of Kearns J. (as he then was) in *Sheedy*. It is pointed out that he referred to *Killilea v. The Information Commissioner* [2003] 2 IR 402, but without adverting to the fact that that case concerned the exercise of a statutory discretion to discontinue a review and did not involve a question of statutory interpretation. Further, the Judge cited *Gannon v. The Information Commissioner* [2006] 1 IR 270, but without noting that in that case, the applicant, a lay litigant, had formulated his complaint in terms of irrationality.

11. On behalf of the Commissioner, it is said that no issue is taken with the Minister when he says "there is no role for deference . . . when it comes to the interpretation of statutes", but it is said that if the judgment of the High Court is read carefully, that it is clear that there was in fact no such mischief here. It said that in the case of an appeal, various aspects may come into play, there may be questions of fact, in particular there may be questions of mixed law and fact and there may be questions of statutory interpretation. It said that on a close reading, it is clear that the High Court Judge was fully conscious of the fact that statutory interpretation is for the courts, and that when it came to statutory interpretation, there was no question of judges appointed under the Constitution deferring to the Commissioner or anyone else.

12. Reading the judgment of the High Court, I confess to having had concerns that the Judge in the Court below was over-influenced by judicial review concepts. I was struck by the fact that he quoted his own decision in *McKilleen v. The Information Commissioner* [2016] IEHC, where he had said:

> "[i]t seems to me, therefore, that at this juncture, it is beyond argument that the standard to be met by an appellant in a s. 42 appeal is virtually indistinguishable from that applied by the court in judicial review matters. Accordingly, a decision of the respondent will not be interfered with unless it is either based on no evidence or flies in the face of fundamental reason and common sense. It is thus immaterial if the court would have arrived at a different decision based on the same evidence. Inferences will not be set aside unless they are such that no reasonable decision maker could have drawn them."

However, while the invocation of what was said in *Deely* without reference to the important correction and clarification in *Sheedy* does give rise to concern, I have been unable to find any instance where, on an issue of pure statutory interpretation, that the High Court Judge either deferred to the Commissioner or actually applied judicial review principles. Therefore, I would not accept the Minister's criticisms of the Commissioner in this regard.

The Presumption under the Statute

13. The appellant Minister contends that the Commissioner erred in his interpretation and application of s. 22(12) (b) and that his erroneous approach received the endorsement of the trial Judge. Section 22(12) (b) of the 2014 Act provides, so far as material:

> "(12) In a review under this section—
>
> . . .

(b) a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the head concerned shows to the satisfaction of the Commissioner that the decision was justified."

The Minister made two submissions to the Trial Judge, that s. 22(12)(b) does not apply to exemptions under s. 36 at all, or if it does apply at all, that it applies only to subsection (1) and not to the public interest override in subsection (3). There is no doubt that the Commissioner operated on the basis that a presumption applied. In the course of his decision at pages 2 and 3, he had commented:

'[f]irst, s. 22(12)(b) of the FOI Act provides that when I review a decision to refuse a request, there is a presumption that the refusal is not justified unless the public body shows to the satisfaction of the Commissioner that the decision was justified'.

Therefore, in this case, the onus is on the Department to satisfy me that its decision is justified.

14. Moreover, when informing the Minister that he had received an appeal against his decision to refuse access to the documents, he specifically referred to this provision. Indeed, as we will see, the Commissioner has taken the position that the failure of the Minister to challenge the Commissioner's approach should result in the Minister's arguments on the issue not being entertained. The Commissioner contends that the Minister, having failed to raise any issue about the interpretation of s. 22(12) (b) when invited to make submissions to the Commissioner is precluded from now doing so in Court. The Commissioner refers to cases such as *South West Area Health Board v. The Information Commissioner* [2005] 2 IR 547 where Smyth J. at p. 553 had observed:

". . . it would be wholly unsatisfactory that a decision on appeal should be made without the matter having first been raised before the Commissioner."

The Commissioner says that further support for his positon is to be found in the *Governors of the Hospital for the Relief of Poor Lying in Women v. The Information Commissioner* [2013] 1 IR 1 at 29 (the *Rotunda* case) where Fennelly J had said:

> "I think it is an integral part of any appeal process, other than possibly an appeal by complete re-hearing, that any point of law advanced on appeal shall have been advanced, argued and determined at first instance."

In the High Court, Noonan J. addressed the merits of the issue and rejected the Minister's submissions, but went on to say that even if he was wrong in coming to the view that he did, that he was satisfied that it was not a point that the Minister was entitled to raise in the appeal.

15. While I would entirely agree with what I identify as the philosophy underlying cases such as the *Rotunda* case and the *South Western Health Board* case that no encouragement should be offered to parties to hold back points, I do not believe that is what happened here. Neither do I see the situation as comparable to what was in issue in the *Rotunda* case. The background to that case involved efforts by the son of a single woman who gave birth to a child in the Rotunda Hospital in 1922 to find out her age. An issue arose in the High Court as to whether the Freedom of Information Act applied to old records. This was an issue which had never been raised before the respondent and on which she had never ruled. In truth, therefore, the High Court was being asked not to hear an appeal, but rather, to decide the issue at first instance. Here, on the other hand, the issue of s. 22(12) (b) was always to the fore of the Commissioner's mind. He referred to it in correspondence, though by asserting that a particular legal situation prevailed rather than in the context of inviting submissions on the issue, and the issue featured prominently in the decision. In the circumstances, I believe the Minister was entitled to advance the arguments that he did in the High Court and the High Court was correct to rule on them.

16. There is a further aspect, which to some extent mirrors the situation that developed in the *Rotunda Hospital* case. The High Court has in fact ruled on the issue and has offered a determination on an issue of considerable importance. If the view is taken that it ought not to have ruled on the matter and, by extension, that this Court should not do so either, the effect of that would be that the High Court's ruling would be rendered immune from appeal. I do not believe that would be a correct approach and so I propose to address the merits of the issue that have been argued in relation to the presumption.

17. Turning, then, to the substance of the arguments in relation to s. 22(12)(b), on behalf of the Commissioner, it is said that the wording of the statute is plain, and moreover, that the interpretation for which he contends accords with the philosophy underlying the statute. The Commissioner says that the language of s. 22(12)(b) could not be plainer "a decision to refuse to grant an FOI request shall be presumed not to have been justified unless the Head concerned shows to the satisfaction of the Commissioner that the decision was justified". It said that there is no great complexity about the phrase: "the decision to refuse to grant". Sometimes it may involve just a single issue, an example offered is as to whether a document is actually held by a particular public body, or in other cases, it may involve consideration of a number of issues. In these cases, the decision to refuse is the product of the consideration brought to bear and conclusions reached on those issues. It is said that this is a case where the plain and literal reading of the section and the philosophy underlining the statute accord. Reference is made to a number of judicial statements about the logic behind the statute. In *Sheedy v. The Information Commissioner* [2005] 2 IR 272, Fennelly J, having cited the long title to the 1997 Act, observed:

> "[t]he passing of the Freedom of Information Act 1997 constituted a legislative development of major importance. By it, the Oireachtas took a considered and deliberate step which dramatically alters the administrative assumptions and

culture of centuries. It replaces the presumption of secrecy with one of openness. It is designed to open up the workings of government and administration to scrutiny. It is not designed simply to satisfy the appetite of the media for stories. It is for the benefit of every citizen. It lets light in to the offices and filing cabinets of our rulers. The principle of free access to publicly held information is part of a worldwide trend. The general assumption is that it originates in the Scandinavian countries. The Treaty of Amsterdam adopted a new Article 255 of the EC Treaty providing that every citizen of the European Union should have access to the documents of the European Parliament, Council and Commission."

A similar tone was struck by McKechnie J. in *Daly v. The Information Commissioner* [2001] 3 IR 439, who at 442, observed:

> "[i]t is, in my view, a piece of legislation independent in existence, forceful in its aim and liberal in outlook and philosophy."

18. The Minister says that the arguments on behalf of the Commissioner ignore the architecture created by the statute which he acknowledges provides that "subject to this Act, every person has a right to and shall on request therefore be offered access to any record held by any FOI body". However, the Minister is quick to add that s. 11 of the Act, which creates the right of access, is clear and specific in stating that nothing in the section shall be construed as applying the right of access to an exempt record – (a) where the exemption is mandatory or (b) where the exemption operates by virtue of the exercise of a discretion that requires the weighing of the public interest, if the factors in favour of refusal outweigh those in favour of release. The Minister says that in this case, by virtue of the terms of s. 35, dealing with information obtained in confidence, and s. 36, commercially sensitive information, that he was justified in withholding the document. On behalf of the Minister, it said that the argument applies with particular force in the case of s. 36, dealing with

commercially sensitive information as it is not in dispute that the document in question does contain commercially sensitive information.

19. The Minister says that the interpretation for which he contends receives powerful support from the decision of Macken J. in the *Rotunda* case.

20. The treatment of this issue by Macken J. and consideration of the extent to which her views had the support of other members of the Court is central to the dispute between the parties. Accordingly, her observations bear quotation *in extenso*. At para. 258, Macken J. commented:

> "...[a] separate argument of a more general nature is made by the respondent that she was entitled, in considering the application of s. 26(3), to have regard to the provisions of s. 34(12)(b) of the Act. It provides:
>
> '[A] decision to refuse to grant a request under section 7 shall be presumed not to have been justified unless the Head concerned shows to the satisfaction of the Commissioner that the decision was justified'.
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> 259. This is a very clear statement which, on its face, appears to apply to all decisions. I have no difficulty in its application to all circumstances covered by the right of access in s. 6(1). I have a significant difficulty in its application to requests made in respect of information exempt from disclosure under Part III of the Act, which by statute mandates a refusal and to which no right of access exists. It is difficult to see how it would apply to the provisions of sections 19 to 32, other than the Head in question meeting the terms of the various sections. Even then, it is difficult to see how a Head goes about 'justifying' a decision in the case of, say, s. 19(1)(b) which exempts from disclosure, *inter alia*, a record which has been or is proposed to be submitted to the Government for its consideration, which I take as the first example of the type of record covered.

> Either s. 34(12) does not apply to such exempt records, or it has sufficiently satisfied that the record in question is, in fact, one submitted to or is proposed to be submitted to the Government. Such proof would likely suffice if it is made by an appropriate person, and could not be rejected by the respondent, save in the most exceptional circumstances, of which I can imagine none. If, therefore, s. 34(12) of the Act does apply, and I do not accept the respondent has established that it does to Part III records, then compliance with the terms of s. 26(1)(a) also appears sufficient to justify the decision made. In the present case, I am satisfied that that legal requirement was complied with by the submissions made on the part of the appellant responding to the criterion mentioned in the section itself, and from the terms of the original refusal. As I have mentioned previously in this judgment, neither the respondent nor the High Court judge suggested that the opinion criteria mentioned in s. 26(1)(a) were not met."

21. The Commissioner does not at all share the Minister's views about the significance of the observations of the remarks of Macken J. The Commissioner says that her remarks were *obiter*, and that even taken at face value, did not expressly decide the point, but simply said that in her view, there was "a significant difficulty with the application of the presumption". Secondly, it is said that Macken J's approach diverged from that of other members of the Court. In particular, it is said that the judgment of Fennelly J. is inconsistent with the approach taken by Macken J. It is said that the example given by Macken J. reveals the limitations of her remarks. Whatever merits there might be about taking the view that a record either is or is not a document which has been or is proposed to be submitted to Government for consideration, the "it is" or "it is not" approach is of no assistance when it comes to considering the issues raised by, for example, s. 36(1) and s. 36(3).

22. For my part, I cannot dismiss the significance of what Macken J. had to say as easily as does the Commissioner. Firstly, I do not believe that there is anything like the divergence in approach between Fennelly J. and Macken J. that the Commissioner suggests. On the contrary, the fact that Fennelly J. commented that records containing personal information were therefore *prima facie* exempt from disclosure unless coming within one of the exceptions indicates a starting point very similar to that of Macken J. If there was, in fact, the divergence between Fennelly J and Macken J. that the Commissioner suggests, I think it would have been inconceivable that Murray CJ and Hardiman J. would have agreed with both judgments. Moreover, the comments of Macken J. in this regard were significant, considerate, and deliberate. This was not a question of an over-broad aside to be dismissed as mere *obiter*. Given the significance of what was at issue, I again think it is inconceivable that Murray CJ and Hardiman J. would have said they agreed with the judgment of Macken J. if they did not in fact agree with what she had to say in the passage quoted above.

23. It is true that the statement contained in s. 11, the equivalent to the section under consideration by Macken J, is a very clear statement which, on its face, appears to apply to all decisions. However, the terms of s.28 to 41 found in Part IV of the Act of 2014, dealing with exempt records, are equally clear.

24. It is noteworthy that Part IV deals with a range of different situations and a wide variety of different types of records. Sometimes, a head may refuse to grant a request and sometimes a head is mandated to refuse a request: "a head shall". Section 28, for example, which is headed 'Meetings of the Government' at subsection (1) lists a number of categories of documents which a head may refuse to grant access to, while subsection (2) of s. 28 lists a number of categories of documents which a head is mandated to refuse to grant. In the case of s. 35(1), the obligation on a head is that subject to this section, a head shall refuse to grant an FOI request if the document comes within the section. In the case of s. 36, dealing with

commercially sensitive information, the obligation on the Head is that subject to subsection (2), a Head shall refuse to grant an FOI request if the record concerned falls within the categories referred to at subsections (a), (b) and (c). In the case of both s. 35 and s. 36, it is of course the case that at subsection (3) in each instance, it is provided "subject to section 38(a), subsection (1)(a) shall not apply in relation to a case in which in the opinion of the head concerned, the public interest would, on balance, be better served by granting than by refusing to grant the FOI request".

The Tests Applied – Erroneous or Not

25. I find myself in agreement with the views expressed by Macken J. in *Rotunda*, and I may add I believe also in agreement with the views of the other members of the Supreme Court.

26. In the circumstances, I must conclude that the Commissioner in this instance approached his task on an incorrect legal basis. Given the fact that the Commissioner referred to his understanding of the presumption in correspondence with the Minister and referred to his understanding of the presumption in the text of his decision, I cannot regard this error as anything other than significant.

27. Whatever view one takes about the relevance or non-relevance of the presumption, there remains for consideration the question of whether the High Court was correct in rejecting the arguments advanced on behalf of the Minister which were that the Commissioner had applied the wrong tests in deciding to direct access. The Minister says that in at least two respects, the Commissioner fell into serious error. Firstly, the Minister says that in a situation where the Commissioner accepted that enet's competitive position could be prejudiced in the event of disclosure and that, accordingly, the record sought was commercially sensitive, that the Commissioner erred by requiring that exceptional

circumstances needed to be established if the need for transparency was to be overridden. The Minister says that the Commissioner unilaterally read into s. 36 a presumption that all records containing commercially sensitive information are to be released unless exceptional circumstances are established justifying non-disclosure. It said that the approach of the Commissioner subverts the entire scheme of s. 36 and the interplay between subsections (1) and (3) thereof put in place by the Oireachtas. The requirement for exceptional circumstances is one that has been created by the Commissioner and was never a requirement envisaged by the Oireachtas.

28. On behalf of the Commissioner, it is said that the reference to exceptional circumstances is being taken out of context and that all that was involved was that the Commissioner was carrying out the mandated public interest balancing test. This, it said, was not a question of the Commissioner setting a particular legal threshold, but rather, referring to a conclusion that was reached on the public interest balancing tests. Here, what was involved was the expenditure of public money and, in truth, it is said that in those circumstances, the arguments in favour of disclosure are powerful and it would indeed take something exceptional for disclosure to be denied. It is pointed out that the Commissioner's reference to exceptional circumstances echoes language that is to be found in a number of judgments. So, in the *Minister for Education v. The Information Commissioner* [2009] 1 IR 588, McGovern J. had commented:

> ". . . the Act provides that it was the intention of the Oireachtas that it is only in exceptional cases that members of the public should be deprived of access to information in the possession of public bodies. It is clear that the legislation operates on the basis that a decision to refuse to grant a request is to be presumed by the Commissioner not to have been justified."

Again, in *Minister for Agriculture & Food v. The Information Commissioner* [2000] 1 IR 309, O'Donovan J. had remarked:

> ". . . in the light of its preamble, it seems to me that there can be no doubt but that it was the intention of the legislature, when enacting the provisions of the Freedom of Information Act, 1997, that it was only in exceptional cases that members of the public at large should be deprived of access to information in the possession of public bodies and this intention is exemplified by the provision of s. 34(12)(b) of the Act which provides that a decision to refuse to grant access to information sought shall be presumed not to have been justified until the contrary is shown"

29. It was comments such as those of McGovern J. and O'Donovan J. which caused the High Court Judge in the present case to say, as he did at para. 51:

> "[t]o my mind, therefore, there is nothing novel or innovative and, less still, erroneous in the Commissioner's determination that the onus was on the Minister to demonstrate exceptional circumstances to justify the refusal in this case."

For my part, I am not so sure. I think there is substance in the repost on behalf of the Minister that there is a distinction to be drawn between the Commissioner's reference to exceptional circumstances and the references in a number of cases to exceptional cases. It seems to me and the references in a number of earlier judgments to exceptional cases are no more than references to how decisions pan out, that it is likely to be the situation that in many cases, indeed, the majority of cases, that disclosure will be ordered. On that view, the reference to exceptional cases is simply a statement that the general position is that records will be released, but that is subject to exceptions and those exceptions, absolute or qualified, are set out in the Act. The distinction between "exceptional cases" and "exceptional

circumstances" is a fine one, and were it not for one factor, I would not consider condemning the Commissioner by reference to it.

30. In the course of the section of the decision of the Commissioner, which the Minister says involved the introduction of an inappropriate threshold to be crossed, the Commissioner quotes with approval from a decision of the former Commissioner in Case 99183 (*McKeever Rowan Solicitors & The Department of Finance*) as saying that the public body in that case "could not reasonably be expected to keep that information or any of the other contract terms confidential in the absence of exceptional circumstances". He went on to quote from Case 98049 (*Henry Ford & Sons Ltd. & Ors. & The Office of Public Works*) where the former Commissioner quoted "one would have to question, having regard to the coming into force of the Freedom of Information Act, how any public body could have an understanding that the details of its expenditure of public money would be kept confidential". He referred to the fact that they were made in the context of a statutory provision dealing with confidentiality, but went on to say that, nonetheless, he believed that they identified a principle of openness about the use of public funds and assets which applied equally to the consideration of the public interest under s. 36. He then expressly stated that he adopted the views espoused in the cases referred to. He went on to say that the parties had not pointed to any exceptional circumstances that apply in the case such as to override the need for transparency. It seems to me that these observations, in the context of the quotation from earlier decisions of earlier Commissioners, are suggestive of something more than the application of the facts to the particular case. Indeed, it suggests the creation of a threshold.

31. Even though that is so, if that was the only point in the case, I would be slow to condemn the decision. The Commissioner was speaking of the absence of exceptional circumstances and to exceptional circumstances that apply rather than referring to any positive duty to specifically establish specific circumstances. It is the case, as the

Commissioner pointed out, that enet was the successful bidder in a tender process for the use of State-owned assets which generate revenue and one would expect that there would be transparency around transactions of that kind. In practice, something exceptional would have to be present for a contrary conclusion to be arrived at. The error, if indeed it is an error, is a limited one and its potential impact may be limited.

32. The second suggested error is, in my view, altogether more fundamental. At p. 7 of his decision, the Commissioner stated:

> "[t]hirdly, neither the Department nor enet has demonstrated to me that releasing the contract would 'totally undermine' enet's business (see Case No. 98114 above)."

33. The reference to the earlier decision, Case 98114, is rather unfortunate. As quoted earlier in the decision, Case 98114, *Eircom plc. v. The Department of Agriculture and Food & Ors.* did not set a threshold at a requirement for the total undermining of a company business. Rather, the instance of a situation where a business would be totally undermined was offered as an example of where the public interest in openness would be trumped. However, by p. 7 of the Commissioner's decision, this is no longer an example, but it is now being stated as a fact that the Department nor enet has failed to demonstrate that releasing the contract would "totally undermine" enet's business. In my view, this represents a clear and fundamental error. There is no requirement that the business of a company engaging with the State should be totally undermined. It seems unlikely in the extreme that the Oireachtas would ever have contemplated setting the bar at such a level. What if the effect of release was to undermine the business? To undermine significantly? To undermine seriously? Would such circumstances not militate against directing disclosure?

34. In my view, it is an inescapable conclusion that the introduction of a requirement of totally undermining was an error in law, was an error or real importance and is such that the decision cannot be allowed stand.

35. I digress momentarily. The introduction of the requirement for total undermining is found in the third of a series of points made by the Commissioner. I would draw attention to the first point made in the series. The Commissioner had commented:

> "[i]n the first place, I do not accept that the release of this information would deter future potential bidders from seeking to manage, maintain and operate this revenue-generating asset on behalf of the State. Indeed, as the former Commissioner observed in Case 98049 cited above, there would appear to be a contradiction between the arguments that on the one hand, competitors will use the information in future tenders, and yet, on the other hand, competitors will be deterred from entering future tenders."

36. With the greatest respect to the Commissioner, and it seems to be his predecessor who is being quoted, this observation seems to me to be a complete non-sequitur. The making of such a statement is suggestive of the adoption of a particular attitude. I can see nothing inconsistent whatever in saying that there may be potential competitors who will study the information coming into the public arena and use it to their benefit when tendering in the future, something which may disadvantage enet, and that there may be others who would be in a position to tender, and might, in other circumstances, consider tendering, but might be dissuaded from doing so because of concern that information that they would expect to see kept confidential would not in fact be kept confidential.

37. In a situation where it seems to me that there are clearly serious issues to be considered in terms of the need to protect commercially sensitive information, but where there are clearly significant countervailing considerations which would suggest that the

public interest might, on balance, be better served by granting than refusing the FOI request, I would, subject to hearing counsel on this point, remit the matter to the Commissioner for further consideration.

The Arguments addressed to Section 35

38. Having regard to the views I have reached on the issues just discussed, it is, strictly speaking, unnecessary to address the arguments that have been advanced in relation to s. 35(2). However, for the sake of completeness, I will address them briefly. Subsection 35(1) provides:

> "(1) Subject to this section, a head shall refuse to grant an FOI request if—
>
> (a) the record concerned contains information given to an FOI body, in confidence and on the understanding that it would be treated by it as confidential (including such information as aforesaid that a person was required by law, or could have been required by the body pursuant to law, to give to the body) and, in the opinion of the head, its disclosure would be likely to prejudice the giving to the body of further similar information from the same person or other persons and it is of importance to the body that such further similar information as aforesaid should continue to be given to the body, or
>
> (b) disclosure of the information concerned would constitute a breach of a duty of confidence provided for by a provision of an agreement or enactment (other than a provision specified in column (3) in Part 1 or 2 of Schedule 3 of an enactment specified in that Schedule) or otherwise by law."

However, the provision for non-disclosure in s. 35(1) is qualified by the provisions of s. 35(2) which provides:

"(2) Subsection (1) shall not apply to a record which is prepared by a head or any other person (being a director, or member of the staff of, an FOI body or a service provider) in the course of the performance of his or her functions unless disclosure of the information concerned would constitute a breach of a duty of confidence that is provided for by an agreement or statute or otherwise by law and is owed to a person other than an FOI body or head or a director, or member of the staff of, an FOI body or of such a service provider."

In his decision, which was upheld by the High Court, the Commissioner took the view that s. 35(2) was relevant in this case and that it served to dis-apply s. 35(1). The appellant says that was a misreading of s. 35(2) which applies to a record prepared by the head or other person acting as an agent, such as a service provider, in the course of the performance of his or her functions *qua* head. It said that in this case, enet was not a service provider performing the function of a head. The High Court Judge took the view that s. 35(2) was unambiguous and that the interpretation contended for by the Minister was, in his view, somewhat tortuous and contrary to the plain meaning of the words actually used. The Commissioner contends that the High Court's view that the section was unambiguous was plainly correct and that the view contended for by the Minister that it applied to documents created by a service provider only in circumstances where the service provider was acting "in the stead" of a head is misconceived.

39. I must confess that I find little clear or unambiguous about subsection (2) and either interpretation contended for gives rise to odd, and it might be thought somewhat undesirable results. The High Court Judge commented:

"[i]n general, a Freedom of Information body and a party providing services to such a body cannot rely on a confidentiality clause as between themselves to prevent access to information held by the Freedom of Information body. There are

obviously sound policy reasons why this should be so, consistent with the object of the legislation."

There seems to be much force in the observations of the High Court Judge and if the argument contended for by the Minister was to be accepted, there would be very considerable opportunities for bodies subject to the Freedom of Information Act and those providing services to them to put themselves, *prima facie*, outside the scope of the Act.

40. However, on the other side of the equation, it seems to me that there is also force in the contention by the Minister that if the meaning argued for by the Commissioner was to be accepted, that it would mean that there could never be a duty of confidence between a public body and any service provider with which it enters into contract. The Minister, with some force, says that if that was the intention of the Oireachtas, that there could never be a duty of confidence in the relationship between a public body and a service provider, that such a stark and dramatic prohibition would have been simply and clearly stated.

41. With considerable hesitation, I have concluded that on this point, the arguments on behalf of the Commissioner are the stronger. There is nothing in the subsection about service providers and others acting *qua* head. It seems to me that the Commissioner's interpretation more closely reflects the ordinary language of the subsection.

42. There is one further argument relating to s. 35, the duty of confidence section, to which I should refer. I do so notwithstanding that it is of limited impact if the effect of s. 35(2) is to dis-apply s. 35(1), as I have been prepared to accept is the case. At p. 8, para. 5, the Commissioner observes:

> "On examining clause 32, I note that it itself is subject to the FOI Act.
>
> . . . although clause 32(1) of the contract requires the party to keep the contract confidential, clause 32(2) disapplies this obligation to disclosures which are required under the Freedom of Information Act."

43. I find the Commissioner's reasoning somewhat misconceived. I do not see the reference to s.32(2) dis-applying the obligations to disclosure which are required under the FOI Act. Rather, it seems to me that the contract requires the parties to maintain confidentiality, but there is properly and sensibly a recognition that, however much either or both of the parties might wish otherwise, that the desire for confidentiality may have to yield to the provisions of the Freedom of Information Act. I find the suggestion that the parties have ceded rights that they would otherwise have to confidentiality by referring to the Freedom of Information Act strained indeed.

Summary

44. In summary, I am of the view that the Commissioner erred when he approached the case on the basis that records exempt by statute were presumed to require disclosure. Insofar as it is not in dispute that the document sought is commercially sensitive, and as much is expressly acknowledged by the Commissioner, I am of the view that he erred in looking for exceptional circumstances if the exemption was not to be overridden. More fundamentally, I am of the view that the Commissioner erred in taking the view that documents exempt by statute should be required to be disclosed unless doing so would undermine totally the business of the company to which they related.

45. Insofar as the judgment of the High Court had endorsed the Commissioner's approach in these respects, I would respectfully disagree and accordingly I would allow the appeal.